

## TRAINING MODULE 12

### STUDY PLAN

# Death Pension

#### Objective:

To learn how to assist a claimant to submit a claim for death pension, and to become familiar with the requirements for such claims.

#### References:

Title 38 U.S. Code, Chapter 15.

38 Code of Federal Regulations, Part 3.

Adjudication Manual M21-1, Part I, Appendix B; Part IV

Adjudication Manual M21-1MR (Manual Rewrite), Parts 5 and 8.

VA Pamphlet 80-06-01, *Federal Benefits for Veterans and Dependents*.

#### Instructions:

Study the assigned reference materials to learn the requirements for death pension claims. Pay special attention to the income information in the application, as that will be a major portion of the development of the claim.

#### Summary:

**D**EATH PENSION IS AN INCOME SUPPLEMENT PROGRAM FOR A LOW-INCOME SURVIVING spouse and/or children of a veteran. The basic requirements for death pension are: the veteran served during a wartime period, income and net worth are within specified limits, and Dependency and Indemnity Compensation (DIC) is not payable.

VA currently maintains three death pension programs:

- “Old law pension,” also known as “protected pension”;
- “Section 306 pension,” also known as “86-211 pension”; and
- “Improved pension,” which is the current pension program.

Improved pension began on January 1, 1979. All persons who were in receipt of pension under either of the prior pension laws, or who had a pension claim pending on that date, are protected under those laws for as long as they continue to meet the income and net worth limits of their

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program. If the pension award is terminated for any reason, the claimant may only reopen the claim under the current (improved) pension program. In addition, since the claimant's status is in effect frozen, he or she may not claim additional pension because of being housebound or being in need of regular aid and attendance, unless he or she elects improved pension. The balance of this module pertains to the current (improved) pension program.

Application for death pension is made by submitting VA Form 21-534, *Application for Dependency and Indemnity Compensation, Death Pension and Accrued Benefits by a Surviving Spouse or Child* (see the sample application in Training Module 8, pages 8-7 through 8-14).

Qualifying wartime service for pension purposes means that the veteran served on active duty for at least 90 consecutive days, at least one day of which was during a wartime period; or if less than 90 days, was discharged because of disability for which service connection could be established without resort to any presumptive provisions of the law; or had a disability for which service connection could be established which would have warranted a discharge for disability; or had two or more separate periods of active service for an aggregate of 90 days or more during more than one period of war. For veterans whose wartime service was Gulf War Era (beginning August 2, 1990), minimum active duty service requirements (24 consecutive months or the full period for which called to active duty, whichever is less) apply: the veteran must have met either the minimum active duty service requirement or the general qualifying service requirement above, whichever was the greater.

In addition to the above, service requirements for death pension will be met regardless of the length of the veteran's service if at the time of death the veteran was receiving, or was entitled to receive, compensation or retired pay for a service-connected disability incurred or aggravated during a wartime period. [38 CFR § 3.3(b)(4)(ii)] Finally, if a veteran dies while on active duty under circumstances precluding payment of service-connected benefits (e.g., the death was not in line of duty, or was the result of willful misconduct), death pension may still be payable to the surviving spouse and/or children provided the veteran had served honorably for at least two years, any part of which was during a wartime period. [38 CFR § 3.1(d)(2)]

Income and net worth limits for improved pension are spelled out in 38 USC 1541, 1542, and 1543. The income limits are adjusted periodically; the adjusted limits are published in the "Notices" section of the *Federal Register*, and are listed in Adjudication Manual M21-1, Part I, Appendix B. All family income from all sources is counted, unless specifically excluded. Specific categories of countable income are discussed in 38 CFR § 3.271. Categories of excluded and/or excludable income are listed in 38 CFR § 3.272. In addition, an extensive (but not comprehensive) listing of specific sources of countable and non-countable income is contained in M21-1, Part IV, Chapter 16, **Income and Net Worth**, Subchapter IX, **Improved Pension—Counting Specific Types of Income**. Medical and certain other expenses, paid by the surviving spouse and/or family members and not reimbursed from any source, may be *deducted* from otherwise countable income to reduce the levels determining pension rates payable. See Module 13, Section 2, **Deductible Expenses**, for more information.

Higher income limits apply if the surviving spouse has children in custody; however, the children's incomes are then also counted, as well. In addition, higher income limits also apply if the surviving spouse is housebound or in need of regular aid and attendance.

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A child beyond age 18 who was in the custody of an eligible surviving spouse before reaching age 18 will remain on the spouse's award as an additional dependent if the child is attending school (up to age 23) or is determined to be permanently incapable of self-support (helpless). In this circumstance, the child has no independent entitlement to pension, even if he or she is living elsewhere while attending school. A child not in the custody of the surviving spouse has separate entitlement, and that child's income and net worth are counted separately from the surviving spouse and any children in the spouse's custody. If there is no eligible surviving spouse, the income for each child is counted according to the formulas set out in 38 CFR § 3.24, and payment made as appropriate to or for each eligible child.

Pension is not payable to or for a surviving spouse and/or a dependent child if the spouse's or child's net worth is of such size that it would be reasonable for it to be consumed for the maintenance of that beneficiary. This is determined on a case-by-case basis, taking into account factors such as the nature, source(s), and amount(s) of income and assets; the nature and amount(s) of debts and expenses; the number and age(s) of any children; anticipated educational expenses for such children; the spouse's and/or children's state of health; and the anticipated life expectancy of the surviving spouse and/or children (where appropriate). In general, net worth is usually not a factor unless it is greater than \$80,000.

To determine the pension rate(s) actually payable, the surviving spouse's and/or children's total annual countable family income (after exclusions and deductions) is subtracted from the applicable income limit and the difference divided into twelve equal payments. If the total annual amount payable would be less than 4% of the maximum annual rate, payments may be made quarterly, semi-annually, or even annually (depending on the amount payable), unless the claimant specifically requests monthly payments.

It is not required that a dependent have been recognized prior to the veteran's death. The regulations specifying the evidence requirements for dependents are given in Training Module 3. Note that there are time limits for recognition of a surviving spouse for benefits purposes: in general, when the marriage occurred *after* service the surviving spouse must have been married to the veteran for at least one year prior to the veteran's death, or for any length of time if a child was born of the marriage or was born to them before the marriage. For death pension specifically, the surviving spouse will qualify regardless of the length of the marriage if the marriage took place prior to the specified delimiting date for the particular wartime period, as set out in 38 CFR § 3.54(a). There are *no* length of marriage requirements if the marriage occurred while the veteran was in service, or before service, or if a married servicemember dies while on active duty. [38 CFR § 3.54]

Even if the marriage between the surviving spouse and the veteran cannot be recognized because of some legal impediment, it may still be "deemed valid" for VA benefits purposes providing several requirements are all met:

1. The marriage occurred one year or more before the veteran died, or existed for any length of time if a child was born of the purported marriage, or was born to them before such marriage;
2. The claimant entered into the marriage without knowledge of the impediment;
3. The claimant continuously cohabited with the veteran from the date of the marriage to the date of the veteran's death; and
4. No claim has been filed by a legal surviving spouse who has been found entitled to gratuitous death benefits (other than accrued monthly benefits covering a period prior to the veteran's death). [38 CFR § 3.52]

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If the veteran and the surviving spouse had lived in a common-law relationship, then even if such relationship was not recognized in their state of residence the relationship still may be “deemed valid” for VA benefits purposes if all of the above requirements are satisfied.

Since November 1, 1990, the remarriage of a surviving spouse *permanently* terminates the spouse’s eligibility for death pension. The only exception is if the requirements of 38 CFR § 3.55(a)(1) are met: the remarriage is void, or has been annulled by a court having basic authority to render annulment decrees (unless it is determined by VA that the annulment was obtained through fraud by either party or by collusion).

A claim for death pension by any class of dependent is **ALWAYS** a claim for DIC also, as well as **ALWAYS** being a claim for any available accrued benefits. In general, if a surviving spouse qualifies for both DIC and death pension, DIC will be awarded as the greater benefit. However, a surviving spouse may elect to receive death pension instead if it is to the spouse’s advantage, even though it is a lesser benefit. [38 CFR §§ 3.152(b); 3.702(d)(2)]

Accrued benefits includes any claim (whether formal, informal, or inferred) for a recurring benefit that was pending and unresolved at the time of the veteran’s death; or any recurring benefit that was due but not paid at the time of the veteran’s death, such as when a claim was approved but the veteran died before the initial check was issued; or there were unnegotiated or non-negotiated checks. If the accrued benefit is based upon a claim pending at the time of the veteran’s death, all of the evidence necessary for a favorable decision must have been in file on the date of the veteran’s death. For this purpose, the term “in file” means the evidence was in VA, in VA’s possession, even if it was not physically in the veteran’s claims file on that date.

If more than one class of dependents applies, the order of precedence for accrued benefits is (1) surviving spouse; (2) children (in equal shares); (3) parents (in equal shares). If there are no eligible (or potentially eligible) survivors, any accrued amounts available are only payable as reimbursement to the person(s) or entity who paid the costs of the veteran’s final illness, funeral and burial. Previously, payment of the retroactive benefits as accrued was limited to two years prior to the month of death; Public Law 108-183 removed this restriction for veterans who died on or after December 16, 2003. [38 CFR § 3.1000]

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### Study Questions:

Using the assigned references and reading materials, answer the following questions:

1. The surviving spouse and two children have countable income for VA purposes of \$9,150. Their maximum annual (improved) pension rate is \$9,202. How would they be paid?
  - a. Monthly
  - b. Quarterly
  - c. Semiannually
  - d. Annually
2. The veteran served from August 7, 1962 to August 6, 1964. He was married on May 7, 1985, and was killed in a traffic accident on February 20, 1986. No children resulted from the marriage. The surviving spouse is now applying for VA death pension. She reports no income except for General Assistance. Are eligibility requirements for death pension met?
  - a. Yes
  - b. No—Veteran has no wartime service.
  - c. No—Surviving spouse was married to veteran less than one year when veteran died.
  - d. No, for both of the above reasons.
3. There is no eligible surviving spouse. There are two dependent children, ages 15 and 19. The 19-year old is attending college, and has earned income of approximately \$4,200 per year, but no unearned income from interest or other sources. The 15-year old has no income from any source. Are both children within the income limits for pension?  
(Y/N)
4. Surviving spouse is receiving pension under Public Law 86-211. Information is received that she has been placed into a nursing home because of inability to care for herself. Is she entitled to additional pension because of need for regular aid and attendance?
  - a. Yes—Nursing home care always raises a presumption of need for aid and attendance.
  - b. No—86-211 pension is frozen at its present level, and may not be increased for any reason.
  - c. Yes—but only if she elects to change to improved pension.

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5. There is no eligible surviving spouse. There are two minor children, both in the custody of the same parent. One child has income beyond the maximum annual pension rate, and is not eligible for VA pension. Does this affect the other child's entitlement? (Y/N)
6. The surviving spouse of a wartime veteran is also a veteran and is in receipt of VA pension. She must now elect whether to receive improved pension as a veteran or as the survivor of a veteran. (T/F)
7. A child who is included on the award of a surviving spouse receives property which causes the child's own net worth to become excessive. What is the effect on the spouse's pension award?
  - a. So long as the award remains in a running status, there is no effect.
  - b. The child must always be removed from the award.
  - c. The child is removed from the award, unless doing so results in the surviving spouse receiving a greater monthly rate without the child than with it; in that event, no action is taken.
  - d. The child's net worth is added to the surviving spouse's net worth, and the entire award is terminated.
8. A surviving spouse has income, including Social Security benefits, that makes her income for VA purposes just within the maximum annual pension rate. There is a cost-of-living increase in Social Security rates that raises her income for VA purposes over the maximum for the year. There is no change in any other income amount. Does this cause the surviving spouse to lose entitlement to VA pension? (Y/N)